ALOE VERA (M) SDN. BHD.

v.

AVACARE INC. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 3903 OF 1985]
3 SEPTEMBER 1985

CIVIL PROCEDURE: *Jurisdiction - Foreign jurisdiction clause - Whether jurisdiction of Malaysian Courts ousted by this clause - Parties to the action - Second defendant incorporated in Malaysia.*

CIVIL PROCEDURE: *Foreign jurisdiction clause - Distributorship agreement- Plaintiff having sole distributorship rights of 1st defendant's products in Malaysia - First defendant an American company - Agreement providing that contract to be construed in "accordance with the Statutes of the State of Texas" - First defendant terminating agreement and appointing 2nd defendant as agent - Second defendant a Malaysian company - Plaintiff served writ and ex parte interlocutory order on 2nd defendant - Second defendant seeking to set aside writ and interlocutory order.*

CIVIL PROCEDURE: *Injunction - Interlocutory - Principles on which it is granted - 'American Cyanamid' case.*

The plaintiff, a Malaysian company, entered into a written agreement with the 1st defendant (an American company) on 15 March 1983 whereby the plaintiff was given exclusive distributor-ship rights in Malaysia of certain of the 1st defendant's products to the plaintiff for a minimum period of 10 years. The agreement contained a foreign jurisdiction clause which, *inter alia*, provided that the venue and forum for the construction of the agreement would be Dallas, Texas. The 1st defendant purported to terminate the agreement in June 1985 and also began to distribute its products in Malaysia through a Malaysian company (the 2nd defendant). On 19 July 1985, the plaintiff by an *ex parte* application, obtained an interlocutory injunction *inter alia* restraining the defendants from marketing in Malaysia the products covered by the exclusive distributorship agreement. The 2nd defendant is now seeking to have the writ and interlocutory injunction set aside on the grounds that the agreement contained a foreign jurisdiction clause and that therefore the Malaysian Courts did not have jurisdiction to try the action.

Held:

[1] The 2nd defendant, not being a party to the agreement in question, is not entitled to rely on the ouster clause. As far as the 2nd defendant is concerned the proper venue for the plaintiff to bring proceedings against it clearly is Malaysia. On the authority of *Evans Marshall & Co. Ltd. v. Bertola SA & Anor.* (*ISI*) [1973] 1 All ER 992, and on logic, the action as against the 2nd defendant has been properly (*vis-a-vis* jurisdiction) brought in the Malaysian Courts.

[2] As to the interlocutory injunction, an application of the principles stated in *American Cyanamid v. Ethicon Ltd.* [1975] 1 All ER 404 made it clear that in all the circumstances the plaintiff was entitled to the interlocutory injunction.

[2nd defendant's application dismissed.]

Cases referred to:
Evans Marshall & Co. Ltd., v. Bertola SA & Anor. (ISI) [1973] 1 All ER 992
American Cyanamid v. Ethicon Ltd [1975] 1 All ER 404

For the 2nd defendant/applicant - Ranjit Singh; M/s. Ranjit, Thomas & Kula
For the plaintiff/respondent - C.V. Das with Nagarajah Muttiah; M/s. Shook Lin & Bok

JUDGMENT

VC George J:
[On encl. (18)]

The plaintiff is a Malaysian Company. Since about 1981 it has been functioning as the distributor in Malaysia of certain products supplied to it by the first named defendant, an American corporation. On 15 March 1983 the plaintiff and the first named defendant entered into a written agreement. This gave exclusive distributorship rights in Malaysia of certain of the first defendant's products to the plaintiff for a minimum period of 10 years. In accepting the exclusive distributorship the plaintiff by Clause 4 of the agreement agreed not to sell through its distributors any products which are not the products of the first defendant. *Inter alia* the agreement also provided as follows:

> ... The venue and forum for this agreement shall be and is Dallas County, Dallas, Texas.
>
> This contract constitutes the complete agreement between the parties and shall be governed by and construed in accordance with the Statutes of the State of Texas...

By a letter dated 13 June 1985 the first defendant purported to determine the agreement. The plaintiff protested but the first defendant was not only adamant but had begun to distribute its products in Malaysia through a Malaysian Company called Avacare (Malaysia) Sdn. Bhd. which appeared to have been newly incorporated.

The plaintiff contends that the premature determination of the agreement by the first defendant was wrong. On 13 July 1985 it caused the writ herein to issue against both the defendants for a declaratory judgment that its agreement with the first defendant continues to subsist, an injunction restraining the defendants and each of them from proceeding as if the agreement had been properly and effectively determined, alternatively for damages. On 19 July 1985 the plaintiff by an *ex parte* application obtained an interlocutory injunction *inter alia* restraining the defendants from marketing in Malaysia the products covered by the exclusive distributorship agreement.

The writ and the interlocutory order were served on the second defendant who having entered a conditional appearance now seeks by summons-in-chambers encl. (18) to have the writ set aside and in any event to have the interlocutory injunction set aside (certain other consequential orders are also sought) on the grounds that the plaintiff and the first defendant had expressly agreed that the forum and venue of any dispute arising out of the agreement "shall be and is Dallas, County Dallas, Texas" and that accordingly the Malaysian Courts did not have jurisdiction to try the action.

Leave to serve the writ on the first defendant out of the jurisdiction had to and had been obtained and the necessary steps to effect service were being taken. However when the summons encl. (18) was heard the first defendant had not been served with the writ.

The short answer to the second defendant's application is that the second defendant, not being a party to that agreement between the plaintiff and the first defendant, is not entitled to rely on the ouster clause. The cause of action as against the second defendant is its

alleged interference with what the plaintiff holds out to be its exclusive right in Malaysia to market those products of the first defendant which exclusive right the plaintiff contends, continues to subsist. Even if the proper venue to bring the action against the first defendant is Dallas, Texas, U.S.A. (I see no call for me to come to a decision on that issue at this stage) as far as the second defendant is concerned the proper venue for the plaintiff to bring proceedings against it clearly is Malaysia.

In *Evans Marshall & Co. Ltd. v. Bertola SA and Anor*. (*ISI*) [1973] 1 All ER 992 the facts were almost identical to the facts in the instant case. Evans Marshall & Co. Ltd., an English company brought an action in the English Courts against Bertola SA, a Spanish company for the purported wrongful determination of a distributorship agreement for the marketing of the Spanish company's products in England. Bertola had also purported to give the distributorship rights in respect of their products to ISI, an English company who the plaintiff brought in as a second defendant. In the agreement between Evans Marshall and Bertola was a provision that disputes arising out of the agreement should be tried in the Spanish Courts. However Kerr J refused Bertola's application to discharge an *ex parte* order that had been made granting leave for the plaintiffs to serve Bertola out of the jurisdiction. This was upheld by the Court of Appeal. *Inter alia* the Court of Appeal agreed with Kerr J that even if there is an exclusive jurisdiction clause giving jurisdiction to a foreign Court, the English Courts would in exceptional cases allow a party to sue in England notwithstanding such an agreement. Sachs LJ wrote the leading judgment of the Court but for the purposes of the issues in the instant case it is sufficient to read from the short addendum of Cairns LJ said (at p. 1010),

> In my opinion this is one of those exceptional cases. I base that view on all the grounds set out in the judgment of Kerr J, but particularly on the ground that the plaintiffs have claims against both ISI and Bertola, and there can be no question but that the action against ISI is properly brought in England. Counsel for the defendants suggested that the plaintiffs should first proceed in Spain against Bertola to establish their contractual rights, and then, if they succeeded, bring or continue this action against ISI here. Not only would this involve duplication of proceedings, but it would greatly delay the enforcement of any claim the plaintiffs have against ISI and inhibit the obtaining of an interlocutory injunction against them.

Applying that thinking to the facts of the instant case I cannot but conclude that on logic and on authority the action as against the second defendant has been properly (*vis-a-vis* jurisdiction) brought in the Malaysian Courts. Accordingly, the application to set aside the writ as against the second defendant is dismissed.

The second defendant also sought to have the interlocutory injunction granted by the Court on 19 July 1985 discharged and set aside.

It is now clear that the second defendant company was incorporated in July 1985 and had hardly commenced trading when the injunction was granted. As against that is the position of the plaintiff who has been marketing the first defendant's products since about 1981. An application of the principles stated in *American Cyanamid v. Ethicon Ltd.* [1975] 1 All ER 404 made it clear that in all the circumstances the plaintiff was entitled to the interlocutory injunction. The application to set it aside is accordingly dismissed.

The costs of and incidental to the summons encl. (18) shall be paid by the second defendant.

The second defendant is given 30 days from the date hereof to file and deliver its defence.

Also found at [1986] 2 CLJ 218